Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Paul Shivers,

Plaintiff,

- against -

The City of New York, The New York City Department of Education and Dennis Miller, an infant overthe age of 14,

Defendants.

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Index Number: 17846/10

Motion Date: 4/24/12

Motion Cal. Number: 21

Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion by defendants, The City of New York and The New York City Department of Education (DOE), for summary judgment; and cross-motion by plaintiff for leave to amend the summons and complaint and bill of particulars.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition.....	9-10
Reply.....	11-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City and the DOE for summary judgment dismissing the complaint against them is granted. Cross-motion by plaintiff for leave to amend the summons and complaint and bill of particulars, pursuant to CPLR 3025(b), to allege that the City and the DOE owed him a special duty, is denied.

Plaintiff, a New York City police officer assigned to the NYPD's School Task Force, allegedly sustained injuries as a result of being assaulted by defendant Miller, a student, in the hallway of John Bowen High School in Queens County on February 4, 2010 while in the course of his duties patrolling the hallway. According to plaintiff, Miller made a derogatory comment to him as the two

passed each other in the hallway, prompting plaintiff to stop Miller and ask him for his identification. Miller, thereupon, allegedly attacked plaintiff and plaintiff allegedly sustained injuries while attempting to arrest and handcuff Miller.

Plaintiff served a notice of claim upon the City and the DOE on April 30, 2010, alleging that plaintiff's injuries were caused by defendants' negligence in failing to provide plaintiff with a safe place to work, in allowing Miller to be in the school, in failing to provide adequate personnel, security and safety procedures, negligent hiring and supervision, in failing to warn plaintiff of the danger and in violating "applicable" rules, regulations, standards and ordinances pertaining to public safety within schools and, specifically, the DOE's Chancellor's Regulations, including §§A-101, 240, 412, 443 and 450 and the DOE's discipline code.

Plaintiff thereafter commenced the present action on July 15, 2010. The complaint alleges two causes of action against the City and DOE. The first cause of action alleges that plaintiff's injuries were caused by municipal defendants' negligence in the operation, management, control and supervision of the school premises. The second cause of action asserts a claim pursuant to §205-e of the General Municipal Law, alleging violation of "applicable" rules, regulations, standards and ordinances pertaining to public safety within schools and, specifically, the DOE's Chancellor's Regulations, including §§A-101, 240, 412, 443 and 450 and the DOE's discipline code.

The City contends that plaintiff's common law negligence cause of action against it must be dismissed pursuant to the firefighter's rule, that his common law negligence cause of action against the DOE must be dismissed because plaintiff did not plead and cannot prove a special duty and that plaintiff fails to set forth a cognizable legal predicate to a cause of action under §205-e of the General Municipal Law.

Plaintiff cross-moves for leave to amend his bill of particulars and complaint to allege that the City and DOE owed him a special duty, the breach of which was a proximate cause of his injuries.

The so-called "firefighter's rule" was coined to refer to the common law rule followed in New York which barred firefighters from maintaining negligence actions for injuries sustained in the line of duty related to the risks they are expected to assume as part of their job (see Santangelo v State of New York, 71 NY2d 393 [1988]). That rule was later applied to police officers as well as

firefighters (see id.; Cooper v City of New York (81 NY2d 584 [1993]). The City contends that the common-law negligence claim asserted against the City by plaintiff is defeated by the "firefighter's rule" since plaintiff's injuries were caused by a specific risk associated with his job as a police officer. The Court agrees.

The Court notes that the common law "firefighter's rule" was statutorily superceded in 1996 by General Obligations Law § 11-106 which gives firefighters and police officers a negligence cause of action for line of duty injuries against any person or entity except the firefighters' or police officers' employer or co-employee (see L 1996, ch 703, § 5).

Since it is undisputed that plaintiff was acting within the scope and course of his employment as a NYC police officer, his common law negligence cause of action as against the City is barred by GOL §11-106 as a matter of law (see Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; Link v City of New York, 34 AD 3d 757 [2nd Dept 2006]).

His claim against the City under General Municipal Law §205-e is also without merit as a matter of law and must be dismissed.

As a prerequisite to recovery under General Municipal Law §205-e for the negligent failure to comply with a statute, ordinance, rule, order or governmental requirement, a police officer must demonstrate an injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties (see Galapo v City of New York, 95 NY2d 568 [2000]; Desmond v City of New York, 88 NY2d 455 [1996];Link v City of New York, supra). To support a claim under General Municipal Law § 205-e, a plaintiff must identify the statute or ordinance with which the defendant failed to comply (see Williams v City of New York,2 NY3d 352, 363 [2004]). Plaintiff has failed to do so.

Moreover, the specific references to §§A-101, 240, 412, 443 and 450 of the Chancellor's Regulations cannot support a cause of action under §205-e, as they merely set forth internal agency procedures. Indeed, plaintiff's counsel, in his affirmation in opposition, only contends that §A-412(II)(A)(1)(a) and (b) of the Chancellor's Regulations was a body of law that satisfied General Municipal Law § 205-e. These two subsections provide that when a DOE employee or school safety agent has been provided with information or an allegation of a school-related crime posing a danger to students, staff or the school community, said employee or school safety agent must immediately notify the police if the incident creates an

immediate safety emergency and then advise the principal and, in situations that do not pose an immediate threat, notify the principal of the incident and the principal, in turn, must notify the police and the school safety agent. Plaintiff's counsel contends that since it is undisputed that Miller was involved in a school-related crime weeks prior to the incident in question, wherein he allegedly threatened to shoot and kill the Dean, and, therefore, the City and the DOE were required to report the incident to the NYPD, including plaintiff, plaintiff satisfied the requirement of GML §205-e. Plaintiff alleges that had he been properly notified of this incident, he would have waited for back-up before confronting Miller.

This section, as heretofore noted, sets forth merely internal agency procedures and does not constitute the type of law or ordinance contemplated by §205-e. Even were it such a law or ordinance, it still does not support a cause of action by plaintiff under §205-e. The language of §A-412 makes it clear that it was implemented to afford police protection to students, staff or the school community, not protection to the police itself to whom an incident is required to be reported. In addition, plaintiff's contention that had he known of the prior incident with Miller, he would have taken the precaution of waiting for back-up before confronting Miller is disingenuous, since he testified in his deposition that he was, in fact, with his partner, a school safety agent who was an employee of the NYPD, at the time of the incident. Thus, there is no issue of fact as to whether his lack of knowledge of Miller's past behavior was a proximate cause of his alleged injuries.

With respect to the issue of special duty, it is well settled that a municipal agency cannot be held liable for acts of negligence committed in the performance of its governmental functions in the absence of a special relationship with the plaintiff (see Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]).

Providing security in public schools is not a proprietary function but a governmental function involving policymaking, and is therefore a discretionary act rather than a ministerial one (see Bonner v City of New York, 73 NY 2d 930 [1989]; Pope v State, 19 AD 3d 573 [2nd Dept 2005]). A discretionary act of a governmental entity may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). Therefore, plaintiff's first cause of action based upon the DOE's negligence in the operation, management, control and supervision, including his boilerplate allegations in his bill of particulars that the DOE was negligent because it failed to provide him with a safe place to work, failed to keep him from harm, allowed Miller to be a student at the school,

failed to warn and failed to provide adequate personnel, security and safety procedures must be dismissed.

Thus, since the provision of school security is a discretionary act, the concept of special duty does not even apply (see McLean v City of New York, supra; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.).

The Court notes that prior to McLean, courts were guided by such cases as Pelaez v Seide (2 NY 23 186 [2004]) and Kovit v Estate of Hallums (4 NY 3d 499 [2005]) which, it was generally thought, articulated the rule that a special relationship between the plaintiff and the municipality or municipal entity was an exception to governmental immunity from liability for the negligent performance of a discretionary act. However, the Court of Appeals, in McLean, for the first time held explicitly that the special duty exception to a municipal entity's immunity for negligence in the performance of a governmental function applies only to ministerial acts, as opposed to discretionary acts. "[D]iscretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is involved" (12 NY 3d at 202). The Court of Appeals further stated that "any contrary inference that may be drawn from the quoted language in Pelaez and Kovit is wrong" (id. at 203).

Therefore, since the the school's safety and security measures involved the discretion and judgment of the DOE, plaintiff's first cause of action must fail, as a matter of law.

However, even were the facts of this case amenable to analysis under the concept of special duty, plaintiff has failed to assert special duty in his notice of claim (see Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). A condition precedent to commencement of a tort action against a municipality or municipal entity is the service of a notice of claim upon the municipality or municipal entity(see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted]). Thus, since plaintiff did not allege in his notice of claim that his injuries were proximately caused by the City's and the DOE's breach of a special duty owed to him, his cross-motion for leave to amend his complaint and bill of particulars to add a cause of action based upon special duty is unavailing and must be denied.

In any event, the time within which a plaintiff may seek leave

to serve a late notice of claim is coextensive with the one year and 90-day statute of limitations period for commencement of actions against a municipality or municipal entity under General Municipal Law §50-i (see Noel v. Shahbaz, 274 AD 2d 381 [2nd Dept 2000] citing Purdy v. Afton Central School District, 202 AD 2d 776 [3rd Dept 1994]). Since plaintiff's cause of action accrued accrued on February 4, 2010, he is now time-barred from amending his notice of claim.

Moreover, a notice of claim may properly only be amended to correct technical, inconsequential mistakes or omissions (see General Municipal Law §50-e[6]; Torres v. New York City Housing Authority, 261 AD 2d 273 [1st Dept 1999]). Amendments of a substantive nature are not permitted (see Gordon v. City of New York, 79 AD 2d 981 [2nd Dept 1981]). Plaintiff's proposed amendment of the complaint to assert a cause of action based upon a breach of a special duty is substantive and would not be permitted, even if sought within the statute of limitations period.

Even had plaintiff asserted in his notice of claim a cause of action based upon a breach of a special duty, he has failed to set forth any showing that the school had implemented any measures designed specifically to protect him personally against assaults by students such as Miller or a limited class of police officers of which plaintiff was a member (see Corcoran v. Community School Dist. 17, 114 AD 2d 835 [2nd Dept 1985]) and that plaintiff detrimentally relied upon such special duty (see Feinsilver v. City of New York, 277 AD 2d 199 [2nd Dept 2000]; Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]).

Plaintiff's additional argument that the motion is premature because discovery is incomplete is without merit. The mere hope that the discovery process may yield evidence favorable to plaintiff is insufficient to warrant denial of summary judgment (see Goldes v City of New York, 19 AD 3d 448 [2nd Dept 2005]).

Finally, the record establishes, and there is no dispute, that John Bowen High School is a public school under the New York City Department of Education. The DOE (formerly known as the Board of Education) is a separate and distinct entity from the City (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the DOE for purposes of education. Suits involving public schools may only be brought against the DOE (see New York City Charter §521[b]). The rule that tort actions relating

to public schools may only be brought against the DOE and not the City is not limited merely to claims of premises liability but also applies to actions involving intentional torts (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Although the City has not moved for summary judgment upon this ground, the Court, in searching the record, sua sponte grants summary judgment to the City upon the additional ground that no cause of action lies against the City, as a matter of law, since the City does not operate, maintain or control the subject public school(see Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]).

Accordingly, the motion is granted, the cross-motion is denied and the complaint is dismissed as against the City and the DOE.

Dated: May 3, 2012

KEVIN J. KERRIGAN, J.S.C.